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UNITED STATES SUPREME COURT

APPELLANT'S JURISDICTIONAL STATEMENT

NO. 80-5440

SHAO FEN CHIN, Individually and as Administrator of the Estate of KE-SIEN CHIN, Deceased,

Appellant,

-against-

ST. LUKE'S HOSPITAL CENTER, VICE PRESIDENT CHARLES W. DAVIDSON, DRS. SEIICH SHIMOMURA, ARMAND REYES, WADE JOHNSON AND OREST HURKO,

Appellees.

ON APPEAL FROM FINAL JUDGMENT OF COURT OF APPEALS OF NEW YORK STATE

SHAO FEN CHIN
Appellant
370 Riverside Drive,
New York, N.Y. 10025
(212) 865-3298

New York, N.Y.
August 30, 1980

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STATUTES:

New York State CPLR 3211, 3212, 5517.....Passium

U.S. Code Title 28, Section 1257 (2).....1,2

(a) REFERENCE TO OFFICIAL OR UNOFFICIAL REPORTS OF THE OPINIONS IN THE LOWER COURTS

There is no report in the Official Edition

New York Law Reports

(b) STATEMENT OF GROUNDS ON WHICH JURISDICITION OF U.S. SUPREME COURT IS INVOLVED

(i) Nature of proceeding and statute pursuant to which it is brought

An action with causes of action for assault, malpractice, negligence, personal injury and wrongful death was brought in the lower court pursuant to state civil practice and rules. Appeal was brought to the U.S. Supreme Court from final order of N.Y. State Court of Appeals dismissing appeal, pursuant to U.S. Code Title 28, Section 1257 (2).

(ii) Date of judgment or decree sought to be reviewd and time of its entry

Appeal was taken from final order of Court of Appeals dismissing appeal, Rosenblatt v. American Cyanamid Co

> "Judgment of N.Y. Court of Appeal sustaining denial of pretrial motion to dismiss complaint for want of personal jurisdiction, grounded upon alleged due process right, was 'final judgment' and was appealable to U.S. S.Ct."

which was equivalent to a judgment of affirmance, Chesapeake and o Ry. Co. v. Mihas

> "Illinois S Ccourt's denial of application for writ of certiorari to review judgment of state Appellate Court, being in effect an affirmance of such judgment, U.S. S Ct has jurisdiction to grant petition for writ of certiorari..."

The order was dated June 5, 1980, entered on the same day. Renewal motion was made and denied on July 1, 1980, Citizen's Bank v. Opperman

"A judgment of a state court becomes final for purposes of review in the federal S. Ct by writ of error or certiorari in a case in which a petition for rehearing is enterained, upon the date of the denial...of such petition"

Notice of appeal was filed on July 25, 1980 in the Supreme Court, New York County of the State of New York.

(iii) Statutory provision which confers U.S. Supreme Court jurisdiction

Appeal to the U.S. Supreme Court was taken pursuant to U.S. Code Title 28, Section 1257, (2).

(iv) Cases sustaing jurisdiction

The following cases are arranged according to the chronological development of my suit:

Francesco Salerno v. Patti Kearney, In the Matter of Richard Saxton et al, Citizen's Bank v. Opperman, Rosenblatt v. American Cyanamid Co., Chesapeake and O Ry, Co, v. Mihas. Central Savings Bank in City of N.Y. v. City of N.Y., Hudson Distributors, Inc. V. Upjchn Co., Ex Parte Stricker.

(v) Validity of State Statute involved

New York State CPLR 3211 (a), 8 and 3212 (c)[1] applied were repugnant to the U.S. Constitution Amendment 14, Section 1.

(c) QUESTION PRESENTED BY THE APPEAL

(i) When the Supreme Court made an order applying CPLR 3211 (a), 8 for lack of personal jurisdiction, but CPLR 3211 (e) provides motion must be made before time to answer expired, and for lack of personal jurisdiction one can either make this motion or by affirmative defense in the answer; and 2 defendants already asserted defense and motion was made

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1. CPLR Annual of New York, 1979 Annual Revision, Mathew Bender and Co., Inc. R3211 Pgs 10268, 10269; R3212 Pgs 1-274, 1-275

after 5 years elapsed when the case was ready on trial by telephone assignment, as I stated service was made in 1976 and two defendants were murder suspect; when the Courts applied the statute violated the state due process; whether the statute applied was repugnant to U.S.C.A. Amendment 14, Section1?

(ii) When I raised the question of 5 year time lapse in my rehear motion, defendants requested the Court to change their prior decided motion from motion to dismiss to motion for summary judgment; thus, the Court decided the motion by applying CPLR 3212, but not ordering immediate trial of fact of service and in fact granted summary judgment disregarding the statutory requirement of CPLR 3212 (c), was violation of state due process; whether the statute applied was repugmant to the U.S.C.A. Amendment 14, Section 1?

(iii) The Appellate Division, First Department order of March 25, 1980 which affirmed the Supreme Court order of September 6, 1979 denying my rehear motion, when I cited trial of facts in summary judgment based on the ground of lack of personal jurisdiction; whether the Appellate Division order was without due process?

(iv) A right was set up the State Constitution Article 1, Section 16 that right of wrongful death can never be abrogated, but my right was deprived disregarding the law of the land under State Constitution Article 1 Section 1 and 2; whether was without due process and equal protection under U.S.C.A. Amendment 14, Sectionl?

(v) When I appealed the Appellate Division order to the Court of Appeals, the Court dismissed my appeal as nonfinal when the State Statute CPLR 5517 provides appeal of a subsequent order based on new facts appealable as of right when Court of Appeals precedent in Cohen and Kargar's Power

of New York Court of Appeals states an order granted a different relief in an amended motion is final, when Court of Appeals precedent decided such a subsequent order; whether Court of Appeals order was an affirmance of the lower courts judgment because I have no further court in the State to appeal and I could not request permission to Appellated Division to appeal as nonfinal order because the March 25, 1980 order was a final order? Whether Court of Appeals dismissal was without due process?

(vi) Whether Appellate Division March 25, 1979 order designating my rehear motion in the Supreme Court and Court of Appeals June 5, 1980 order designating my renew motion as motion to vacate when I made my motion on new facts and authorities and not based on grounds of motion to vacate, without jurisdiction and due process?

(vii) When the State Constitution Article 1, Section 2 and U.S.C.A. Amendment 7 all provide right of trial by the jury, but my cause of action, defendants and a substantial part of the issues were dismissed without a jury trial after 5 year prosecution by illegally applying the State staututes CPLR 3211 (a), 8 and 3212 (c); whether the statutes applied were repugnant to the U.S.C.A. Amendment 7? [2]

(d) STATEMENT OF THE CASE

My wife KE-SIEN CHIN was a very healthy person. In 1973, when she was walking on a street of N.Y. City, tripped by uneven broken concrete surrounding a manhole and fell and broke her left knee. She was treated in defendant ST. LUKE'S HOSPITAL with a plaster cast. After 6 weeks, her knee healed and was scheduled for a routine check up on January 31, 1974. On January 30, 1974, the hospital called my home and cancelled the appointment for the routine check up asking her to come to the admitting office the next day. I

accompanied her to go there the next day. There, three doctors persuaded her to be admitted. My wife was reluctant. After they said it was only for a general physical check up for her benifit and only for 5 days, she consnted.

I later found out from the hospital record it was a selected admission using her as an object of immunological experiment, for metastatic series and to secure hospitals income. This was without my wife's knowledge and consent.

Said hospital authorized its doctors to draw blood from her 3-5 tubes daily and once 12 tubes during one drawing. Upon my knowledge and believe and from evidence, it was for transfusion to another patient.

They introduced dense quantities of bacteria into her body and gave her excessive chemicals and barium for X-rays, which caused her to develop diarrhea 5 times a day. The day before discharge, by biopsy, they diagnosed she had cirrhosis of an unknown origin. Upon my knowledge and belief, this was caused by the injury they inflicted onto her and her liver because she never had liver disease in her life, and said hospital made false record as proof she had liver disease.

On the day of discharge, the doctor in charge,even at my inquiry of treatment for cirrhosis, said she did not need.

After discharge, her diarrhea increased to 7 and more than 10 times a day for 6 months. The X-ray in August showed barium remained in her intestines for 6 months. My wife became very thin and weak and lost much nutrition and was confined to bed rest most of the time. She went to the emergency clinic and regular clinic 5 times. The doctors only gave commercial antidiarrhea and did not treat the cirrhosis. Until defendant DR. SHIMOMURA impirically gave her antibiotic, which is known to doctors as harmful to cirrhosis, when he was informed that

she had cirrhosis, caused my wife to develop ascite and edema.

My wife was admitted again to said hospital on August 9, 1974. Despite my request only to draw blood when absolutely necessary and supply her with blood transfusion, serum albumin, vitamins and glucose, in 7 weeks, they all refused, but drew her blood 3 to 5 tubes against her will, twice by cheating, every other day for 7 weeks for experiment and introduced bacteria into her body which severely injured her. The attending doctor Defendant DR. REYES, who was doing research, on the 1st day intentionally diagnosed her incurable, rare biliary cirrhosis not giveing her treatment for the purpose of continuing the experiment. He refused all my requests to supply glucose, serum albumin and blood transfusion for fear of spoiling data and refused to puncture to let out the fluid in the stomach by using false excuse, which caused my wife intense physical and mental suffering. After the attending doctor and assistant were transfered, I went to request the Vice President of Operations to permit me to employ a specialist of said hospital as private doctor. She intentionally obstructed this idea by directing me to discuss with defendant intern doctor DR. JOHNSON, who was the only doctor treating my wife, or the headnurse. Upon my knowledge and belief, said hospital purposely refused for the purpose of letting interns to collect data.

DR. JOHNSON gave my wife excessive dosage of drugs and calcium gluconate tablets 5 times more than the U.S. allowance for normal adult which resulted poisoning. On September 27, 1974, he maliciously ordered a codeine and Chloral Hydrate 500 mg to be administered to my wife which caused her paralyzed by dizziness for 24 hours. Since then, she could not get off the bed.

On October 3, 1974, I finally got the consent of the head of the Gastroenterology Department to be my wife's private doctor, who scheduled to move her to another department to treat

her himself the next day. My wife was very pleased as she hoped for a long time to have a qualified doctor to treat her. I packed her things and left at 8:30 P.M. At 12:40 A.M., a doctor called stating my wife was seriously ill. When my daughter and I rushed to the hospital and arrived at 12:50 A.M., the guard by doctors' order held us for 5 minutes.

When we got upstairs, defendant DR. HURKO, who was on duty, with a chaplain told me my wife had died. Upon my knowledge and belief, the defendants forced her to death because the chaplain wrote me time of death was 12:55, which means when we arrived she was alive, but was forced to death within 5 mlnutes.

Upon my knowledge and belief, my wife was not dead when we saw her because her body temperature, color were all as alive, and her eyes were shining. I felt her pulse which was slightly beating. My daughter heard a sound. When I asked DR. HURKO whether there was time to save her, he said "No". Later, I found enough medical evidence to indicate she was in coma and had respiratory depression. DR. HURKo told my wife's condition turned worse at 9:30 P.M. and they gave her pain killing drug, that my wife pulled the bell twice, said something to them which they could not understand. Upon my knowledge and belief, DR. JOHNSON intentionally doubled the dosage of codeine to poison my wife, not to let her leave this department alive despite my warning to 3 doctors and the headnurse never to give the pain killing drug to my wife again. Besides, I have evidence that DR. JOHNSON intentionally refused to save my wife despite her requests.

The case was on malpractice panel hearing in November, 1978. Justice Nathaniel Helman led 2 members,despite of 2 admission hospital record, my 86 allegation and evidence in the report, in 30 minutes, made a prejudicial unanimous decision that

all 5 defendants were not liable.

The case was sent to Part 17A for disposition. After my refusal to settle with murder suspects at 3 pre-trial conferences, I was told by Justice Israel Rubin the case was sent to be tried by telephone assignment and for selection of jury. But, afterwards, my case was transfered to Part 61 of Justice Eugene R. Wolin the the Supreme Court branch at Civil Court. I had another pre-trial conference, where Justice Wolin pressured me to settle. Then, Justice Wolin made an order denying my motion to add a cause of action of fraud and increase the damage or by conforming pleading to proof at trial, to substitute the actual Vice President or add her as a party, to direct subpoena the witnesses by mail, but ordered me to find a lawyer in 90 days. I made an Article 78 proceeding for writs to review and prohibit, but was dismissed by the Appellate Division.

I found out that Part 61 was not a part of trial by the jury. My motion for permission to appeal was denied. When I was appealing the trial proceeding and removal of Justice Wolin as the trial judge, Justice Wolin illegally ordered the trial and struck my case from the calendar. I made a motion to restore the case on calendar on the grounds the part was not part of trial by the jury,and the State Constitution prohibits dismissal of wrongful death cause of action. Despite the defendants twice defaulted at the motion hearings and twice did not submit opposition papers, Justice Beatrice Shanswit denied my motion and renewal motion, thus illegally dismissed a suit without any due process. Then, I had to appeal to the Court of Appeals.[3]

When the case was ready on trial by telephone assignment, defense attorneys illegally made a motion to dismiss 3 principal wrongful death defendants for lack of personal jurisdiction after the suit was prosecuted for 5 years. Despite I raised the question that 5 years had passed because service

was made in 1976, which was without due process, and two defendants were murder suspects, which indicated wrongful death right of action, Justice Xavier C. Riccobono granted the motion.

I made a rehear motion stating that CPLR 3211 (e) prohibited making motion to dismiss for lack of personal jurisdiction after expiration of time to answer and asserting as affirmative defense in the answer. Defendants in their opposition paper, which was in fact a cross-motion, requested the Court to change an already decided motion from motion to dismiss to motion for summary judgment. But under CPLR 3211 (c) and 3212 (c), the statutes provide for dismissal for lack of personal jurisdiction, an immediate trial, Francesco Salerno v. Patti Kearney,

> "Note 3. Judgment. A defendant may move for summary judgment based upon lack of in personam jurisdiction, and the court may order immediate trial of such issues of fact CPLR 3212 (c)"

in which a motion to dismiss was treated as summary judgment, was granted and an immediate trial was ordered. To dismiss without a trial is without due process.

During my appeal to the Appellate Division, First Department, defendants argued for summary judgment. I cited trial of such fact was needed. The Appellate Division affirmed lower court's order of summary judgment without trial was without due process; therefore, the statutes CPLR 3211 (a) 8, 3212 when applied, were without due process and repugnant to the U.S.C.A. Amendment 14, Section 1. Besides, the right of wrongful

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3. "The fact that separate and unresolved issues were pending in Ohio courts and subject to 'further proceedings' therein on cross-petition did not render judgment of Ohio Supreme Court on issue of constitionality of Ohio Fair Trade Act considered and decided nonfinal or unappealable. Hudson Distributors, Inc. V. Upjohn Co."

death action can never be abrogated under the State Constitution. Since the N.Y. State Constitution provide for equal protection under section 11 and a right cannot be deprived unless by the law of the land, dismissal of my defendants under CPLR 3211, 3212 was repugnant to the State Constitution clause and therefore, repugnant to the U.S.C.A. due process clause, Central Savings Bank in City of N.Y. v. City of N.Y.

> "A statute repugnant to the due process clause of state Constitution is repugnant also to this clause".

When I took appeal to the Court of Appeals, the Court dismissed my appeal sua sponte as nonfinal despite I cited all authorities in my jurisdictional statement. The dismissal was one day before I submitted the briefs and transmitted the record. According to CPLR 5517, an order deciding a renewal motion is considered the final order. Under former law, whenever a subsequent order such as listed in CPLR 5517 was entered an appeal from the original order must be dismissed. In my renewal motion, I stated that according to Cohen and Kargar Power of N.Y. Court of Appeals, an order granted an amended motion and granting a different relief is a final order. My renewal motion was denied without an opposition paper on July 1, 1980. In Court of Appeals's precedent In the Matter of Richard Saxon et al, an order granting reargument but adhered to the prior decision was reviewed by the Court of Appeals. According to Carmody and Wait 2d and the legislative study, all subsequent order in CPLR 5517 are appealable and as final orders. Therefore, my 3 principal defendants and cause of action and many issues were dismissed without due process after 5 year prosecution without a jury trial.

(e) GROUNDS THAT FEDERAL QUESTION IS SUBSTANTIAL

The grounds of dismissal involved no state statutory questions. The only question involved is the federal question.

"Due process of law means a course of legal proceeding, according to those rules and principles which have been established in our systems of jurisprudence, for the protection and enforcement of private and personal rights. Ex Parte Stricker".

Respectfully submitted,

SHAO FEN CHIN
Appellant

Dated: August 30, 1980

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first *day of* July *A. D. 19* 80

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Exhibit 1

Mo. No. 712
Shao Fen Chin, Individually &c., Appellant,
vs.
St. Luke's Hospital Center, & ors., Defendants,
and Vice President Charles W. Davidson & ors., Respondents.

COPY

A motion having heretofore been made herein upon the part of the appellant to vacate this Court's order of dismissal dated June 5, 1980, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifth *day of* June *A. D. 19* 80

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Exhibit 2

1 Mo. No. 641 SSD 62
Shao Fen Chin, &c.,
Appellant,
vs.
St. Luke's Hospital Center,
& ors., Defendants,
Vice President Charles W.
Davidson, &ors.,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court

Form C 3000-18175-76 (C.S.) 94

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 25, 1980

Present—Hon. Arnold L. Fein, Justice Presiding,
Leonard H. Sandler,
Joseph P. Sullivan,
Max Bloom, Justices.

Exhibit 3

Shao Fen Chin, Individually and as Administrator of the Estate of Ke Sien Chin, Deceased,
Plaintiff-Appellant,

-against-

St. Luke's Hospital Center, Drs. Seiich Shimomura, Armand Reyes, Defendants,

Vice President Charles W. Davidson, Drs. Wade Johnson & Orest Hurko,
Defendants-Respondents.

7689

An appeal having been taken to this Court by the plaintiff-appellant

from the order of the Supreme Court, New York County

(Riccobono, J.), entered on September 10, 1979, denying plaintiff's motion to vacate said court's order of July 27, 1979 granting dismissal of the complaint as against defendants-respondents,

and said appeal having been argued by Mr. Shao Fen Chin, appellant pro se,

~~of counsel for the appellant~~, and by Mr. William G. Kral

of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order

so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

J. [illegible]

Clerk.

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007

Present: Hon. XAVIER C. RICCOBONO Justice.

CTY.CLK. TO — FROM JUSTICE RECEIVED — SEP 7 1979 — MINUTE BOOK — SPECIAL TERM PART I — N.Y. JOUR.

CTY.CLK. TO — FROM JUSTICE RECEIVED — AUG 27 1979 — BOOK DISP'N — MINUTE BOOK — SPECIAL TERM PART I — N.Y. LAW JOURNAL

Chin

— against —

St Luke's Hospital Center et al

The following papers numbered 1 to ____ read on this motion, refused

No. 131 on Calendar of AUG 24 1979

	PAPERS NUMBERED
Notice of Motion - Order to Show Cause - and Affidavits Annexed	1-7
Answering Affidavit	8-10
Replying Affidavit	11-12
Affidavit	
Affidavit	
Pleadings — Exhibit	
Stipulation — Referee's Report — Minutes	
Filed Papers Order of Riccobono J. See Motion #130 this date	13

MOTION RESPECTFULLY REFERRED TO JUSTICE — XAVIER C. RICCOBONO — IRVING KIRSCHENBAUM

Dated AUG 24 1979

Upon the foregoing papers this motion to reargue a decision of this court dated July 27, 1979 is denied. There is no showing that the Court overlooked any material issue of fact or controlling principle of law in reaching its original decision.

FILED SEP 10 1979 NEW YORK CO. CLERK'S OFFICE

Dated 9/6/79

J.S.C.

Briefs: Plaintiff's ____ Defendant's ____ Petitioner's ____ Respondent's ____ Relator's ____

Briefs

County Clerk's No. 2586, 19 76

Spec I Liber C-207 Line 9, 19 79

New York, N.Y. 10038

Exhibit 4

SUPREME COURT NEW YORK
SPECIAL TERM PART I

CTY.CLK. TO RECEIVES JUSTICE'S COPY 3:13PM
JUL 27 1979
MINUTE BOOK SPECIAL TERM PART I N.Y. LAW JOURNAL

SHAO FEN CHIN, individually and as administrator of the Estate of KE SEIN CHIN, Deceased,

Plaintiff,

-against-

ST. LUKE'S HOSPITAL CENTER, VICE PRESIDENT CHARLES W. DAVIDSON, DRS SEIICH SHIMOMURA, ARMAND REYES, WADE JOHNSON and OREST HURKO,

Defendant.

02586/76

Exhibit 5

RICCOBONO, J.

This motion pursuant to CPLR 3211 (a)(8) to dismiss the complaint for lack of personal jurisdiction as to defendants Charles W. Davidson, Orest Hurko and Wade Johnson is granted in all respects.

The summons and complaint were not served on Davidson and plaintiff's affidavits of service on Hurko and Johnson are defective on their face in that they allege only process on these defendants by mail.

FILED
JUL 31 1979
NEW YORK
CO. CLERK'S OFFICE

Dated: 7/27/79

J.S.C.

R3211 Motion to dismiss. (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence; or 2. the court has not jurisdiction of the subject matter of the cause of action; or 3. the party asserting the cause of action has not legal capacity to sue; or 4. there is another action pending between the same parties for the same cause of action in a court of any state or the U.S.; the court need not dismiss upon this ground but may make such order as justice requires; or 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moviig party, payment, release, res judicata, statute of limitations, or statute of frauds; or 6. with respect to a counter-claim, it may not properly be interposed in the action; or 7. the pleading fails to state a cause of action; or 8. the court has not jurisdiction of ther person of the defendant; or 9. the court has not jurisdiction in an action where service was made under Section 314 or 315; or 10. the court should not proceed in the absence of a person who should be a party. (b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit. (c) Evidence permitted; immediate trial, motion treated as one for summary judgment. Upon the hearing of a motion made under subd. (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment. The court may order immediate trial of the issues raised on the motion. (d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subd. (a) or (b) that facts essentail to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just. (e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in subd. (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs 1,3,4,5,and 6 of subd. (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph 2, 7 or 10 of subd. (a) may be made at any subsequent time or in a later pleading, if one is permitted. An objection based upon a ground specified in paragraph 8 or 9 of subd (a) is waived if a party moves on any of

the grounds set forth in subd. (a) without raising such objection or if, having made no objection under subd. (a), he does not raise such objection in the responsibe pleading. Where a motion is made on the ground set forth in paragraph 7 of subd. (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave. (f) Extension of time to plead. Service of a notice of motion under subd. (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until 10 days after service of notice of entry of the order.

R3212 Motion for summary judgment. (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined. (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action of defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subd (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion. (c) Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subd (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper. (d) Reserved. (e) Partial summary judgment; severance. In any action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any or more parties, to the extent warranted, on such terms as may be just. The court may also direct: 1. that the cause of action as to which summary judgment shall be held in abeyance pending the determination of any remaining cause of action. (f) Facts unavailable to opposing party. Should

it appear from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just. (g) Limitation of issues of fact for trial. If a motion for summary judgment is denied or is granted in part, the court, by interrogating counsel, shall, if practible, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purpose in the action. The court may make any order as may aid in the disposition of the action.

SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF NEW YORK

SHAO FEN CHIN, Individually and as Administrator of the Estate of KE-SIEN CHIN, Deceased,

Plaintiff,

-against-

ST. LUKE'S HOSPITAL CENTER, VICE PRESIDENT CHARLES W. DAVIDSON, DRS. SEIICH SHIMOMURA, ARMAND REYES, WADE JOHNSON AND OREST HURKO,

Defendants.

NOTICE OF APPEAL

Index No. 02586/76

SIR:

PLEASE TAKE NOTICE that SHAO FEN CHIN, the plaintiff herein, appeals to the Supreme Court of the United States from the order of the Court of Appeals of the State of New York, entered in the Clerk's office of said Court on June 5, 1980, which is equivalent to a judgment of affirmance of the judgment of Appellate Division, First Department of the Supreme Court of New York State dated March 25, 1980, which affirmed the Supreme Court order dated September 6, 1979, which granted cross-motion for summary judgment for lack of personal jurisdiction to 3 wrongful death defendants at my renewal motion based on new facts and authorities stating dismissal of defendants after 5 years passed time to answer was disallowed by the state statute.

This appeal was taken pursuant to United States Code Title 28, Section 1257 upon the grounds that the Supreme Court order of July 27, 1979 granting dismissal of complaint for lack of personal jurisdiction to 3 defendants after 5 years passed time to answer when the case was ready on trial by telephone assignment, was without due process; that in my renewal motion

the granting of defendants' cross-motion to amend the prior motion to dismiss to motion for summary judgment without an immediate trial of fact of service, was without due process; that the dismissal of wrongful death defendants and cause of action of wrongful death was against a right which can never be abrogated under the New York State Constitution. Since the statutes of motion to dismiss and motion for summary judgment when applied in this case were repugnant to the State Constitution, according to precedent, when a state statute is repugnant to the State Constitution, it is repugnant to the U.S. Constitution. Besides, the two stautes when applied were without due process; therefore were repugnant to the U.S. Constitution.

The unanimous judgment without opinion of the 5 Justices of the Appellate Division designating my renewal motion in the Supreme Court as "Motion to vacate" was without jurisdiction because my motion was not based on the grounds enumerated in motion to vacate. Besides, an order affirming an order denying a motion to vacate is not appealable to the Court of Appeals.

According to law and Court of Appeals precedent, a renewal motion is an appealable subsequent order which is considered the final order reviewable by the Court of Appeals. According to Henry Cohen's The Powers of New York Court of Appeals, abuse of discretion can be reviewed by the Court of Appeals. According to Cohen and Kargan, The Powers of New York Court of Appeals, a motion to amend a prior motion which order granted a different relief, is a final order; therefore, the order of Supreme Court granting cross-motion to change prior motion to

dismiss to motion for summary judgment and denied my renewal motion is final.

Since it is appealable as of right, I cannot apply to the Appellate Division for permission to appeal to the Court of Appeals as non-final order.

But, the Court of Appeals order entered on June 5, 1980 dismissed my appeal sua sponte as non-final, equals an affirmance of the summary judgment.

I made a renewal motion on June 10, 1980 based on new authorities, but Court of Appeals denied it as "Motion to vacate", which was without jurisdiction because my motion was not based on the grounds enumerated in motion to vacate. According to the U.S. Law, a motion to vacate cannot extend appeal time, but a rehearing can. My motion was denied without an opposition paper.

Upon my inquiry of the designation of motion to vacate for my renewal motion, Court of Appeals replied "... the Court standardizes this category of motion by deeming all such submissions as 'motion to vacate'. This, however, is merely a Court of Appeals characterization of its own motion calendar, and should not be interpreted as more".

Since the 3 principle defendants, two of them were murder suspects, they should not be dismissed without due process of law.

Dated: New York, New York
July 25, 1980

To: COSTELLO & SHEA
Attorneys of Defendants
50 Broadway,
New York, N.Y. 10004

Yours, etc.,

Shao Fen Chin

SHAO FEN CHIN
Plaintiff
370 Riverside Drive,
New York, N.Y. 10025
212-865-3298